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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, ET AL., *Respondents*.

PETITIONER'S REPLY MEMORANDUM

The Government's Memorandum in Opposition states that "the constitutional issues which petitioner seeks to raise in this case are identical to those decided in the *Bailey* case" (Memorandum 2). And it admits that the Court "may wish again to examine the personnel security measures atilized in the Executive branch" in view of the even division of the Court in *Bailey* (*Ibid.*) Its suggestion that this case is inappropriate for that purpose is without merit.

1. The fact that Executive Order 9835, under which the challenged discharge took place, has been superseded by Executive Order 10450, has no effect on the importance of the procedural question presented here—whether a federal employee may be discharged, blacklisted and

branded on the basis of secret information against him. Until the Government is prepared to say (which it cannot) that it no longer follows this practice in its program of "personnel security", this question is just as important now as when it was presented to the Court in *Bailey*.[1]

Furthermore, even if the Orders were procedurally different (and the Government has only pointed to the substantive broadening of the grounds for discharge), the repeal of 9835 would not, of itself, make this case inappropriate for review. The Court has already indicated in *Bailey* that the question is important; indeed, four justices were ready to hold that petitioner there had been discharged in violation of the Constitution. Surely, where a man is penalized under an unconstitutional statute, that action does not become unimportant by the mere fact that the statute is repealed shortly thereafter.

2. The Government also brings the Court's attention to the fact that petitioner was not in the classified civil service.[2] It does not say that civil service employees might be able to claim some specialized protection against the use of derogatory secret information arising from particular civil service regulations or legislation.

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[1] See Statement of Assistant Secretary of Navy Smith, indicating that the Navy intended to continue to rely on secret informants, despite the fact that their unreliability had been demonstrated in the Abraham Chasanow proceedings under Executive Order 10450. Washington Post-Times Herald, September 2, 1954, p. 10; New York Herald Tribune, September 2, 1954, p. 1.

[2] The Government argues that petitioner is "different from the *mass* of federal employees" (Memorandum 4; Italics added) because of the fact that he was not in the classified service. At the risk of quarrelling over numbers, we might point out that of the 2,344,383, paid civilian employees in the executive branch of the Federal Government on June 30, 1953, only 1,014,017—or 43% of them—were covered by the Classification Act of 1949, 5 U.S.C. §§ 1071 *et seq.*, 63 Stat. 964, as amended. *Pay Structure of the Federal Civil Service*, June 30, 1953, Civil Service Commission Pamphlet 33-5, p. 19 (September 1954).

In any case, this is beside the point. The Government's constitutional power is identical, regardless of the technical status of the employee. Petitioner in the *Bailey* case was similarly unclassified.[3] The issue here is a constitutional one—the power of the Government to adopt arbitrary procedures for the discharge of federal employees; had petitioner been in the classified service his argument would be the same.

The Government also adds that petitioner's term of appointment has now run. It does not refer to the fact, however, that he is presently prohibited by the very order challenged from applying for a Government position *"for a period of three years from May 18, 1953"* (Ans., Para. 29, J.A. 22; Italics added).

Respectfully submitted,

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[3] Indeed, the very stipulation quoted by the Government as to petitioner's status was made at the request of Judge Prettyman of the Court of Appeals below. Its purpose was to establish that this case and *Bailey* were substantially identical and not complicated by special civil service legislation or regulations.